1989

Gold Standard v. American Barrick Resources Corpoation, Barrick Resources (USA) Inc.; Texaco Inc., Getty Oil Company and Getty Mining Company : Appellant's Answer to Appellees' Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GOLD STANDARD, INC., Plaintiff and Appellant, vs. AMERICAN BARRICK RESOURCES CORPORATION, BARRICK RESOURCES (USA) INC., TEXACO, INC., GETTY OIL COMPANY and GETTY MINING COMPANY, Defendants and Appellees.	APPELLANT'S ANSWER TO APPELLEES' PETITION FOR REHEARING Case No. 890205 Priority No. 11

INTERLOCUTORY APPEAL FROM AN ORDER ENTERED IN THE THIRD DISTRICT COURT OF TOOELE COUNTY, STATE OF UTAH, BY THE HONORABLE FRANK G. NOEL

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GOLD STANDARD'S ANSWER TO APPELLEES' PETITION FOR REHEARING

Plaintiff/Appellant submits this brief in answer to Getty's Petition for Rehearing (the "Petition").

INTRODUCTION

This Court, in a well-reasoned opinion (the "Opinion"), reversed the lower court and held that two Memoranda (the "Memoranda") created in a 1984 internal Getty investigation were not work product because they were not prepared "to assist in litigation." Opinion, p. 10. The Court further held that under either generally recognized waiver test, Getty waived any work product protection by directly disclosing the document to a known adversary, id., p. 11, and by delaying in moving for protection. Id., p. 12.

Getty now argues that this Court has applied unworkable standards and advocates that work product protection attaches to any document created after litigation may be anticipated, regardless of the document's purpose. Instead, the work product rule should only protect documents created "to assist in the litigation."

Getty also reiterates its unsuccessful argument that it could not have committed a waiver because it did not know its own Memoranda were work product until four years after they were created. Not only does Getty's conduct give rise to waiver, but as this Court stated, it "calls into question" whether the documents were work product in the first place. There is simply no reason for this Court to alter its well-reasoned Opinion on this appeal.

Throughout its Petition, Getty fails to address the Court's essential holdings. Instead, the Petition addresses only tangential factual matters that are of

no consequence to the Court's decision. Getty can point to no reason for the Court to alter its Opinion.

ARGUMENT

I. THIS COURT APPLIED THE PROPER STANDARD OF REVIEW.

Getty asserts that the Court's entire Opinion is tainted because it applied the wrong standard of review. Getty charges that the "Court disregarded the trial court's findings, and made its own independent factual inquiry and determination," and thus improperly failed to "pay deference to findings of the trial court . . . ." Petition, p. 3. Getty attempts to characterize the entire inquiry on the work product and work product waiver issues as essentially factual, so this court will be constrained to pay homage to the "wide latitude of discretion . . . necessarily vested in the trial judge." Id. (quoting Jackson v. Kennecott Copper Corp., 495 P.2d 1254, 1255 (Utah 1972).

Gold Standard suggests, quite to the contrary, that since there were no true issues of fact before the trial court, this Court could properly review de novo the trial court's application of legal standards to the undisputed facts before it. Significantly, to begin with, the trial court's Memorandum Decision contains no findings of fact.[1] This is not surprising, however, since there was no dispute

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1/ The only part of the Memorandum Decision that could even possibly be characterized as a "finding of fact" is its statement that "defendants have not acted in a dilatory manner . . . ." Memorandum Decision, p. 2. This conclusion, however, is in reality an application of the legal standards governing waiver to the undisputed facts that were before that court. As discussed below, the legal interpretation given by the trial court to an undisputed set of facts is a question of law subject to de novo review.

below as to the relevant facts.[2/] Instead, all of the relevant facts bearing on the issues were set forth in the parties' briefs. Since none of the basic facts were disputed, no hearing of any kind was held to enable the trial court to "find" any facts.

The trial court simply applied (incorrectly, as this Court held) the rules of law on work product and its waiver to the undisputed facts before it. It is well established, in this jurisdiction and elsewhere, that when all the facts bearing on a court's decision are contained in a written record, and are not in dispute, that whether the rule of law has been correctly applied to those facts is a question of law, subject to de novo review.[3/]

In Diversified Equities, Inc. v. American Sav. and Loan Ass'n, 739 P.2d 1133 (Utah App. 1987), cert. granted 765 P.2d 1277, one issue addressed was the standard of review applicable to a trial court's decision based upon a stipulated set of facts. The court held that the legal interpretation placed on those subsidiary facts was a question of law subject to de novo review:

[2/] That is, there was no dispute as to what happened, or what the U.S. Supreme Court has referred to as the "basic, primary, or historical facts . . . ." Townsend v. Sain, 372 U.S. 293, 309 n. 6 (1963) (quoting Brown v. Allen, 344 U.S. 443, 506 (1953).

[3/] Issues of fact, to the contrary, are subject to the deferential "clearly erroneous" standard of review. See Rule 52(a), Utah Rules of Civil Procedure. It is important to bear in mind why that deferential standard applies to findings of fact. It is because "a trial judge's opportunity to judge the accuracy of witnesses' recollections and make credibility determinations in cases in which live testimony is presented gives them a significant advantage over appellate judges in evaluating and weighing the evidence . . . ." U.S. v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984), cert. denied 469 U.S. 824 (1984).

> Generally, a trial court's findings of fact are accorded great deference. However, without regard to the labels used, when those "findings" proceed from stipulated facts, as in the instant case, the findings are tantamount to conclusions of law, with the stipulation of facts being the functional equivalent of true findings of fact. See Styles v. Brown, 380 So. 2d 792, 794 (Ala. 1980). See also City of Spencer v. Hawkeye Security Ins. Co., 216 N.W. 2d 406, 408 (Iowa 1974) ("where the facts are not in material dispute, interpretation placed thereon by trial court becomes a question of law which is not conclusive on appeal."); Schroeder v. Horack, 592 S.W. 2d 742, 744 (Mo. 1979) (only issue on appeal was whether trial court drew the proper legal conclusions from the stipulated facts).

Id. at 1146. This analysis was cited with approval by this Court in Zions First Nat'l Bank v. Nat'l Am. Title Ins. Co., 749 P.2d 651, 656 (Utah 1988).

In U.S. v. General Motors Corp., 384 U.S. 127 (1966), an antitrust case, the Supreme Court declared the identical principle:

> [T]he ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the clearly erroneous test. . . . [T]he question here is not one of fact, but consists of the legal standard required to be applied to the undisputed facts of the case.

Id. at 141, n. 16 (emphasis added). See also Taylor & Gaskin, Inc. v. Chris-Craft Indus., 732 F.2d 1273, 1277 (6th Cir. 1984).

Here, as in the cases cited above, there is no question as to the basic facts. The Court made no findings of fact, but instead merely applied legal

standards to the facts that were undisputed on the record before it. Its decision is thus purely legal, and subject to this court's de novo review.[4/]

II. THIS COURT CORRECTLY RULED AS A MATTER OF LAW THAT THE DISPUTED MEMORANDA WERE NOT CREATED IN ANTICIPATION OF LITIGATION.

On the question whether the Memoranda are work product, the central issue on appeal, Getty in its Petition attacks only peripheral, dicta portions of the Opinion, as part of its continuing effort to distort the work product doctrine and turn its "anticipation of litigation" requirement on its head. Getty's Petition entirely fails to address the core holding of the Opinion – that work product protection applies only to documents prepared to "assist in pending or impending litigation." Opinion, p. 9.

Getty's entire argument is addressed to the question whether, as a result of its receipt of Gold Standard's June 28, 1984 letter, Getty anticipated the possibility of litigation with Gold Standard. Getty argues that after this letter it did anticipate litigation and suggests, without analysis, that the Court necessarily

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[4/] Even if this Court believes that a more deferential standard of review is applicable here, because certain of the Court's determinations below were "factual," the only such conclusions that were reached by this Court are contained in dicta that are not essential to the Court's holdings. For example, in Getty's most desparate attempt to discredit the Court's Opinion, it charges that the Court's recitation of the facts is incorrect. See Petition, p. 3, n. 1; pp. 6–7, n. 3. All of the allegedly incorrect facts are, however, mere background facts. Moreover, the accusations appear to be unfounded. The only asserted error to which even Getty attaches any importance is the Court's statement that the feasibility study was presented to Gold Standard in the spring of 1981 when in fact it was presented in June of 1981. Spring ended on June 20th, 1981. This is plainly much ado about nothing.

must also conclude that the Memoranda, prepared after the letter was received, were themselves prepared in anticipation of litigation.

The issue is not, however, whether Getty anticipated litigation (the only matter raised by Getty in its Petition), but whether the Memoranda were prepared in anticipation of that litigation.[5/] Getty conspicuously avoids any discussion of the real issue evidently recognizing, as the Court held, that the undisputed facts dictate compellingly that the Memoranda were not "written to assist in pending or impending litigation." Opinion, p. 9. Based on the undisputed record facts, the Court's conclusion on this issue is unassailable.

Even a cursory review of the relevant facts plainly shows the correctness of the Court's opinion. Although the core purpose of the work product doctrine is to create a zone of privacy for the lawyer preparing a case for trial, no attorney ever had any involvement whatsoever with the two Memoranda. The Memoranda were not prepared at the request of an attorney; indeed, prior to this suit they were never even seen by an attorney.[6/] There is no evidence that any attorney was

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5/ This points out the irrelevance of numerous facts Getty asserts have been incorrectly stated in this Court's Opinion. For example, the date upon which Gold Standard anticipated litigation has no bearing on whether the documents are work product. Moreover, even assuming arguendo that Gold Standard was more threatening with Getty than this Court has found, that has no impact on whether the Memoranda were created to "assist in litigation."

6/ Getty falsely attacks the Court's characterization of Jeff Collins' involvement in the Memoranda's creation. The record shows, however, that the Court's characterization is correct: Collins did not request a response to Gold Standard, did not assist in the creation of the Memoranda, nor did he "take the lead" in drafting the response.

even aware the Memoranda existed until years after they were created, and long after this litigation was commenced. Mr. Kundert, who authored the Memoranda, was not part of any trial team purposefully engaged in trial preparation efforts. He believed, instead, that he was responding to a routine management inquiry. The Court accordingly held, following an abundance of decisional law,[7] that the Memoranda were not prepared "to assist in litigation." On this record, any other holding is simply inconceivable.

Getty is asking this Court, for a second time, to erect an unprecedented legal threshold under which, whenever a party anticipates litigation, any documents created thereafter may be kept secret, whether the documents are created for use in the litigation or not. No authority is cited for such a rule. More importantly, such a rule finds no justification in the policies that led to its creation. The Court has, in its Opinion, provided the Bar with helpful guidance in applying the nebulous "anticipation of litigation" language of Rule 26(b)(3), and should decline Getty's latest effort to turn the work product doctrine into a mechanical rule of secrecy.

III. THIS COURT CORRECTLY HELD THAT GETTY WAIVED WORK PRODUCT PROTECTION FOR THE MEMORANDA UNDER EACH AND EVERY RECOGNIZED WAIVER STANDARD.

This Court correctly held that Getty waived any purported work product protection for the Memoranda under either of the two generally followed lines

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[7] Getty argues that two or three of the many cases relied upon by the Court are distinguishable on their facts, and not persuasive authority. The distinctions, if any, bear only on Getty's mistaken view that the issue is whether Getty anticipated litigation. The distinctions are not germane to whether the documents were prepared in anticipation of litigation.

of analysis used by the courts to determine whether documents are privileged. Any work product protection was plainly waived, as a matter of law, because Getty intentionally produced the Memoranda to its adversary, Gold Standard, which thereafter used the Memoranda extensively in preparing its case. This Court also held that Getty's dilatory conduct in moving to protect the Memoranda constituted an independent waiver.

Getty does not attack the correctness of any of the legal standards applied by the Court, but instead re-hashes its previously unsuccessful argument that waiver could not have occurred because neither Getty nor its legal counsel knew that the Memoranda were work product, until four years after their creation, and could not make this determination until after an intensive investigation.

In support of this unprecedented view of work product waiver, Getty relies on seven cases. Those cases all discuss waiver outside the area of privilege. None address work product, which, as recognized by this Court, is governed by its own "waiver" standards. As the Court has already found, Getty's argument is unsupported and unpersuasive. Its actions constitute a waiver of work product under any recognized standard.

A. Under the "Inadvertent Production" Waiver Test, Getty Committed a Waiver.

Getty's argument that it lacked the requisite knowledge to waive work product protection is irrelevant under the inadvertent waiver test. Under this test, a party that does not realize that it has disclosed work product can retrieve those documents if it acts diligently. Indeed, this Court recognized, following an

abundance of case law, that this test "disregards the disclosing party's intent as irrelevant and focuses on the result of the disclosure." Opinion, p. 10. If the adversary receives the document and confidentiality is lost, there is a waiver. Here, Getty's actions were "much more than inadvertent", Opinion, p. 11, as Getty was cognizant of Gold Standard's use of the Memoranda for a year before it moved for protection. Getty clearly committed a waiver under this line of analysis.

B. Under the Waiver Test Based on a Party's Attempts to Prevent Disclosure, Getty Committed a Waiver.

The second line of analysis focuses on the "intent and precautions of the disclosing party in trying to maintain confidentiality." Opinion, p. 11. The fact that Getty knowingly disclosed the Memoranda to Gold Standard and permitted them to be used, unquestionably results in a waiver under this test as well. Getty's argument that it did not have the requisite knowledge to effect a waiver because its attorneys did not realize that the Memoranda might be work product, fails under this test (or, under any work product waiver test, for that matter) for two other reasons. First, Getty ignores the cornerstone requirement that confidentiality is necessary to maintain work product protection. Second, Getty indisputably knew the Memoranda had been disclosed, yet did nothing.

1. Confidentiality Must Be Maintained In Order For a Document to Retain Its Protected Status.

Getty's entire argument is based on the false premise that "the work product doctrine is not designed to protect confidentiality." Petition, p. 2.

Accordingly, Getty argues that neither circulating the Memoranda to its employees nor permitting Gold Standard to use the Memoranda for a year resulted in a waiver. As this Court ruled, Getty is mistaken.

Clearly, in order to enjoy the protection of the work product rule, a party must act diligently to maintain the confidentiality of any work product from its adversary. As Gold Standard previously argued:

> Once otherwise protectable documents have been disclosed, it is no longer possible to achieve the benefits of any privilege—i.e., confidentiality—and the privilege is lost. See W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771, 775 (W.D. Okla. 1976); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954) ("when the policy underlying the rule can no longer be served, it would amount to no more than mechanical obedience to a formula to continue to recognize it." (emphasis added)). Once confidentiality is lost, the objective of preserving secrecy must yield to the overriding concern of the litigation process—ascertainment of the truth.

Reply Brief at 20–21. See also, e.g., Hartford Fire Ins. v. Garvey, 109 F.R.D. 323, 331 (N.D. Cal. 1985) ("[waiver can be found if] the attorney fails to take any of the available steps to preserve the confidentiality of the work product."). As the intent to maintain confidentiality is, indeed, the focal point of this or any work product waiver test, this Court logically held that Getty waived any protection because "the Memoranda were disclosed directly to a known adversary party." Opinion at 11.

Getty also challenges this Court's reliance on the dicta statement that Getty circulated the Memoranda among its employees. That argument, though, is a

red herring: regardless of whether Getty's employees were privy to the Memoranda, the intentional disclosure of the Memoranda to Gold Standard, Getty's adversary, unquestionably waived any protection for the Memoranda. Moreover, the two cases cited by Getty in support of this argument, are not even remotely factually similar to this case.[8/] Indeed, the case of U.S. v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1954), which was cited by this Court, is on point and indisputably supports the Court's holding that a waiver occurred by Getty's failure to maintain confidentiality.

2. Knowledge of the Document's Disclosure Effectuates a Waiver.

Under this second line of analysis, the dispositive issue is whether a party intended or had knowledge of the document's disclosure (not its potential work product nature, as Getty argues), and whether it took precautions to prevent that disclosure. See Opinion, p. 11. Getty obviously knew that Gold Standard possessed and used the Memoranda and, in effect, ratified Gold Standard's use of the Memoranda by repeatedly failing to assert a work product claim. See Opinion, p. 11. Yet, Getty argues that it should somehow be excused from its waiver because at the time of production, it did not know the documents might be work product. This fact is totally irrelevant, however, since Getty clearly knew the Memoranda

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8/ U.S. v. Gulf Oil Corp., 760 F.2d 292 (Temp. Emer. Ct. App. 1985), concerned documents disclosed to Gulf by another entity pursuant to a merger agreement; Shields v. Sturm, Ruger & Co., 864 F.2d 379 (5th Cir. 1989) concerns a report prepared by a party's expert introduced in another case.

were disclosed to its adversary. Getty thus committed a waiver under this line of analysis.[9/] Moreover, Getty cannot cite even one case for its novel proposition that no waiver occurs, by disclosing a document, when counsel is unaware of a potential work product claim.

Getty further argues that the standards set by this Court "impose an unreasonable obligation on litigation counsel," Petition at 16, and create what amounts in Getty's view to an impossible Hobson's choice every time a party produces documents in litigation. Getty argues, in essence, that before any document can be produced, it will be necessary for litigation counsel to conduct an intensive investigation to determine whether it might be work product.

Getty's argument, that the Court has created a standard that will frustrate the discovery process, is specious. In the huge majority, if not all, cases, trial counsel will know what documents are entitled to work product protection, because they will have generated them. The circumstance Getty contends will create impossible choices for counsel and thus burden the already cumbersome discovery process, would be rare, if not non-existent. In the unusual case where the document was not one prepared by or for the attorney, the potential claim of work

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9/ Even under the rule sought by Getty, it clearly had constructive knowledge that the Memoranda might be work product, at least since the December 1987 deposition of Mr. Kundert, wherein Getty's counsel was unquestionably aware of the possibility that lawyers may have been involved in the creation of the Memoranda and could have conducted a reasonable investigation to ascertain the purported work product nature of the documents. See Honolulu Federal Sav. and Loan Ass'n. v. Pao, 668 P.2d 50, 54 (Haw. App. 1983) ("the waiving party must have had knowledge, actual or constructive."). Cf. Utah Code Ann. § 76-10-1201 ("a person has constructive knowledge if a reasonable inspection or observation under the circumstances would have disclosed the nature of the subject matter . . .")

product ought to be apparent from its face, because it discusses litigation strategy, legal theories, trial preparation, etc.—that is, because it is to "assist in" the litigation. In short, the parade of horribles outlined by Getty in its Petition is based on circumstances that would rarely, if ever, occur.

C. Getty's Delay In Moving For Protection Also Constitutes an Independent Waiver.

This Court further held that Getty's one year delay in moving for protection "constitute[d] an independent waiver." Opinion, p. 12.

In its Petition, Getty attempts to explain part of its delay by its reliance on Mr. Kundert's purportedly erroneous understanding of the Memoranda's origin. However, Getty was alerted to the fact that there may have been attorney involvement in the creation of the Memoranda at Mr. Kundert's December 1987 deposition, and should have investigated the matter at that time and asserted work product as soon as possible thereafter. Because Getty neglected to investigate the origin of its own documents, and did not move for protection until nine months later, this Court correctly concluded that, "Getty's failure to demonstrate any diligence whatsoever in asserting the privilege is itself a waiver." Opinion, p. 12. Nothing in Getty's Petition can possibly justify its lack of diligence in investigating the creation of the Memoranda, or in maintaining their confidentiality.

CONCLUSION

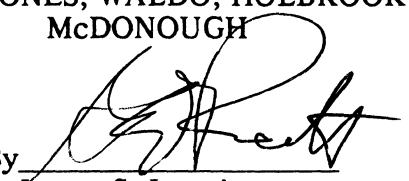
As this Court has held, the work product doctrine is a "narrow exception" to rules of discovery. Trail Mountain Coal Co. v. Arco Coal Sales Co., 749 P.2d

637 (Utah 1988). The parties seeking the protection of this rule have the burden of demonstrating its applicability and maintaining the confidentiality of the asserted work product. Getty has never been able to meet either of these burdens, and should not now have the Memoranda retroactively enshrouded with protective status long after they have been incorporated into its adversary's litigation plans.

For the foregoing reasons, Getty's Petition for Rehearing should be denied.

DATED this 3rd day of December, 1990.

JONES, WALDO, HOLBROOK & McDONOUGH

By 

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CERTIFICATE OF SERVICE

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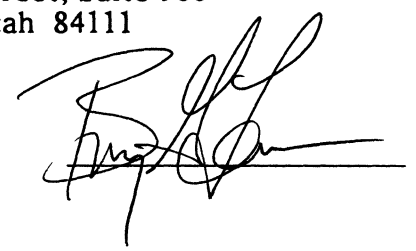

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